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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 TRUSTEES OF THE PLUMBERS AND  
8 PIPEFITTERS UNION LOCAL 525 HEALTH  
AND WELFARE TRUST AND PLAN;  
9 TRUSTEES OF THE PLUMBERS AND  
PIPEFITTERS UNION LOCAL 525 PENSION  
10 PLAN; and TRUSTEES OF THE PLUMBERS  
AND PIPEFITTERS LOCAL UNION 525  
11 APPRENTICE AND JOURNEYMAN  
TRAINING TRUST FOR SOUTHERN  
12 NEVADA,

13 Plaintiffs,

14 v.

15 JUAN CARRILIO SOTELO dba SOTELO AIR  
16 and SOTELO AIR, INC., dba COOL AIR  
NOW,

17 Defendants.

18  
19 TRUSTEES OF THE PLUMBERS AND  
PIPEFITTERS NATIONAL PENSION FUND  
20 AND INTERNATIONAL TRAINING FUND,

21 Plaintiffs,

22 v.

23 JUAN CARRILIO SOTELO dba SOTELO  
24 AIR; SOTELO AIR, INC. dba COOL AIR  
NOW, a Nevada Corporation; JUAN  
25 CARRILIO SOTELO, an individual; NOW  
SERVICES OF NEVADA, LLC dba COOL  
26 AIR NOW, a Nevada limited liability company;  
NOW SERVICES OF NEVADA, LLC dba  
27 PLUMBING REPAIR NOW, a Nevada limited  
liability company; WESTERN NATIONAL  
28 MUTUAL INSURANCE COMPANY, a surety  
company; JOHN DOES I-X and ROE  
CORPORATIONS I-X, inclusive,

Case No. 2:13-cv-00657-RFB-NJK;  
consolidated with  
2:14-cv-01609-RFB-NJK

**ORDER**

**Findings of Fact and Conclusions of Law  
After Court Trial**

1  
2 Defendants.  
3

4 **I. INTRODUCTION**

5 This case involves a collective bargaining agreement, the National Service and  
6 Maintenance Agreement (“Service Agreement”), entered between the United Association of  
7 Journeymen and Apprentices of Plumbing and Pipe Fitters Local 525 (“Local 525”) and Defendant  
8 Juan C. Sotelo (“Sotelo”) doing business as Sotelo Air, Sotelo Air, Inc., and Now Services of  
9 Nevada, LLC (collectively, “Defendants”). Among other requirements, the Service Agreement  
10 required Defendants to make union contributions whenever covered work was performed by union  
11 and nonunion employees. Plaintiffs Trustees of the Plumbers and Pipefitters Union Local 525  
12 Health and Welfare Trust and Plan, Trustees of the Plumbers and Pipefitters Union Local 525  
13 Pension Plan, and Trustees of the Plumbers and Pipefitters Local Union 525 Apprentice and  
14 Journeyman Training Trust for Southern Nevada (“Local Plaintiffs” or “Trust Funds”) and  
15 Trustees of the Plumbers and Pipefitters National Pension Fund and International Training Fund  
16 (“National Plaintiffs” or “National Funds”) (collectively, “Plaintiffs”) seek unpaid contributions  
17 pursuant to the terms of the Service Agreement and Plaintiffs’ policy documents, as well as  
18 attorneys’ fees and costs. The Court held a bench trial in this case on September 1, 2017 and  
19 September 5, 2017. The Court rules in favor of the Plaintiffs based on the following findings of  
20 fact and conclusions of law.

21  
22 **II. PROCEDURAL HISTORY**

23 The Trust Funds’ operative Amended Complaint was filed on August 2, 2013. (ECF No.  
24 6). The Complaint raises allegations of delinquent contributions and attorneys’ fees and costs, in  
25 violation of 29 U.S.C. §§ 1001-1500. On September 10, 2015, the Court ordered that the Trust  
26 Funds file a Renewed Motion for Summary Judgment addressing a contract defense raised by  
27 Sotelo Air in a prior Countermotion for Summary Judgment. The Court also permitted amendment  
28 of the National Plaintiffs’ Complaint at that time.

1           The National Trust Funds’ Amended Complaint was filed on September 17, 2015. (ECF  
2 No. 81). In addition to a breach of contract claim, the National Funds asserted a breach of fiduciary  
3 duty cause of action under ERISA, 29 U.S.C. §§ 1002, 1104, 1109, and 1132. Defendants filed a  
4 Motion to Dismiss that Complaint on October 5, 2015. (ECF No. 85). Renewed Motions for  
5 Summary Judgment were filed and fully briefed. However, due to the parties’ representations  
6 regarding ongoing settlement negotiations, the Court denied all the previously filed motions  
7 without prejudice and directed parties to renew them if settlement negotiations failed. (ECF No.  
8 137). A settlement was not reached, and the Trust Funds and National Funds refiled their  
9 previously filed renewed Motions for Summary Judgment. (ECF Nos. 140, 141). In its order  
10 resolving these motions (ECF No. 216), the Court found as a matter of law: a) a valid contract(s)  
11 had formed between Sotelo (and the successor entities) with the Plaintiffs; and b) Sotelo was not  
12 a fiduciary and was not therefore subject to liability for a breach of a fiduciary duty. The case  
13 proceeded to trial on the factual issues of: a) whether there was a breach of the contracts based on  
14 Sotelo’s and related entities’ not paying contributions as required by the contracts, b) the date of  
15 termination of the contracts, and c) the amount, if any, of delinquent contributions and interest  
16 owed by Sotelo pursuant to the contracts. Following the bench trial that took place on September  
17 1, 2017 and September 5, 2017, the Court took the matter under submission.

### 18 19           **III.     JURISDICTION AND VENUE**

20           This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 for claims arising  
21 under ERISA. The Court has supplemental jurisdiction over state law claims under 28 U.S.C. §  
22 1367. Venue is proper because the underlying actions and corresponding damages occurred within  
23 Clark County, Nevada.

### 24 25           **IV.     FINDINGS OF FACT**

26           Federal Rule of Civil Procedure 52(a)(1) requires the Court to “find the facts specially and  
27 state its conclusions of law separately” in a bench trial. Fed. R. Civ. P. 52(a)(1). Factual findings  
28 must be sufficient to indicate the basis for the Court’s ultimate conclusion. Unt v. Aerospace Corp.,

1 765 F.2d 1440, 1444-45 (9th Cir. 1985) (citing Kelley v. Everglades Drainage Dist., 319 U.S. 415,  
2 422 (1943)). The findings must be “explicit enough to give the appellate court a clear  
3 understanding of the basis of the trial court’s decision, and to enable it to determine the ground on  
4 which the trial court reached its decision.” United States v. Alpine Land & Reservoir Co., 697 F.2d  
5 851, 856 (9th Cir. 1983), cert. denied, 464 U.S. 863 (1983) (citations and quotation marks omitted).

6 After receiving evidence at the bench trial, the Court makes the following findings of fact:

- 7 1. Sotelo Air knowingly entered into a valid contract and became a signatory to the Service  
8 Agreement with Local 525 on May 9, 2008, after receiving the Service Agreement and  
9 having the opportunity to ask questions of Local 525 representatives before signing. At that  
10 time, Sotelo Air was a sole proprietorship owned and managed by Juan Sotelo. Sotelo and  
11 Sotelo Air executed a Standard Form of Participation Agreement (“Participation  
12 Agreement”) whereby Sotelo Air agreed to make contributions to the National Pension  
13 Fund and to be bound by the terms and conditions of the Service Agreement and any  
14 successor Agreement. Among other requirements, the Service Agreement required Sotelo  
15 to make union contributions whenever covered work was performed by union and  
16 nonunion employees.
- 17 2. Sotelo Air, Inc., Now Services of Nevada, LLC d/b/a Cool Air Now, and Now Services of  
18 Nevada, LLC d/b/a Plumbing Repair Now were successors in interest to Sotelo Air. Sotelo  
19 Air, Inc., incorporated in mid-2013, was the first successor legal entity. It received the  
20 usable assets of Sotelo Air without paying for them. At all times, Sotelo was the sole owner  
21 and officer of these business entities.
- 22 3. The Service Agreement by its own terms did not expire unless a written termination letter  
23 was submitted to Local 525.
- 24 4. The Service Agreement Sotelo signed was effective from August 1, 2005 to July 31, 2010,  
25 and renewed on August 1, 2010 for another five-year period. Sotelo was bound by the  
26 Service Agreement until Local 525 received a termination letter from Sotelo on April 9,  
27 2013. The termination was not effective until August 1, 2013. Sotelo did not actually  
28 submit a termination letter before the April 2013 letter.

- 1 5. Richard Carrillo, a business representative for Local 525 at the time of the events in  
2 question, did not receive a termination letter from Sotelo in May 2008.
- 3 6. Between May 9, 2008 and April 9, 2013, Sotelo received the benefit of being a signatory  
4 to the Service Agreement in the form of union work and union employees being referred  
5 to him.
- 6 7. Because Sotelo did not submit a written termination letter to Local 525 until April 9, 2013,  
7 he owes \$95,013.77 in unpaid contributions to the Local Plaintiffs and \$11,308.93 in  
8 unpaid contributions to the National Plaintiffs.

9

10 **V. CONCLUSIONS OF LAW**

11 **A. Liability of Corporate Entities**

12 The Court will first discuss the liability of the entities that were successors in interest to  
13 Sotelo Air, the sole proprietorship. The Court finds that the facts in the record indicate that Sotelo  
14 Air, Inc. merged with and took over the usable assets of Sotelo Air. The Court applies the four-  
15 factor test for a de facto merger endorsed by the Nevada Supreme Court. Village Builders 96, L.P.  
16 v. U.S. Laboratories, Inc., 112 P.3d 1082, 1087 (Nev. 2005) (“To determine whether there has  
17 been a de facto merger, courts apply a four-factor test and consider: (1) whether there is a  
18 continuation of the enterprise, (2) whether there is a continuity of shareholders, (3) whether the  
19 seller corporation ceased its ordinary business operations, and (4) whether the purchasing  
20 corporation assumed the seller’s obligations.”). The Court finds that all of these factors weigh in  
21 favor of successor liability. When Sotelo Air, Inc. acquired the assets of Sotelo Air, there was a  
22 continuation of the enterprise: Sotelo remained the manager of the entity; all assets remained at  
23 the same physical location; and the phone number for the corporation was forwarded to the phone  
24 registered in the name of Sotelo Air. Sotelo Air, Inc. has no shareholders, rendering continuity of  
25 shareholders the same. Sotelo Air was no longer in operation and effectively ceased to exist, and  
26 all business operations were done using the name of the successor entity. The financial obligations,  
27 including paying employees and managing bank accounts, remained the same after the entity was  
28 incorporated. Sotelo’s vendors, clients, and employees all understood that despite the change in

1 name and corporate form, the entities succeeding Sotelo Air continued its operations, including its  
2 obligations.

3 For these reasons, Sotelo, individually, as well as each of the proprietorship and corporate  
4 entities named in this action are jointly and severally liable for the breach detailed below.

### 5 **B. Breach of Contract and Delinquent Contributions**

6 “Basic contract principles require, for an enforceable contract, an offer and acceptance,  
7 meeting of the minds, and consideration.” May v. Anderson, 119 P.3d 1254, 1257 (Nev. 2005).  
8 Breach of contract is “a material failure of performance of a duty arising under or imposed by  
9 agreement.” Bernard v. Rockhill Dev. Co., 734 P.2d 1238, 1240 (Nev. 1987) (citation omitted).  
10 A breach of contract claim under Nevada law requires (1) the existence of a valid contract, (2) a  
11 breach by the defendant, and (3) damage as a result of the breach. Richardson v. Jones, 1 Nev.  
12 405, 408-409 (1865); Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892, 899 (9th Cir. 2013) (citing  
13 Richardson).

14 29 U.S.C. § 1132(g)(2) provides: “In any action under this title by a fiduciary for or on  
15 behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor of the plan  
16 is awarded, the court shall award the plan—

- 17 (A) the unpaid contributions,
- 18 (B) interest on the unpaid contributions,
- 19 (C) an amount equal to the greater of—
  - 20 (i) interest on the unpaid contributions, or
  - 21 (ii) liquidated damages provided for under the plan in an amount not in excess of  
22 20 percent (or such higher percentage as may be permitted under Federal or State  
23 law) of the amount determined by the court under subparagraph (A),
- 24 (D) reasonable attorney’s fees and costs of the action, to be paid by the defendant, and
- 25 (E) such other legal or equitable relief as the court deems appropriate.

26 For purposes of this paragraph, interest on unpaid contributions shall be determined by  
27 using the rate provided under the plan, or, if none, the rate prescribed under section 6621  
28 of the Internal Revenue Code of 1986 . . . .”

“Every employer who is obligated to make contributions to a multiemployer plan under  
the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent  
not inconsistent with law, make such contributions in accordance with the terms and conditions of  
such plan or such agreement.” 29 U.S.C. § 1145.

1 The Court finds that Sotelo, on behalf of other Defendants, violated the terms of the Service  
2 Agreement, and therefore is subject to liability for breach under ERISA. As the Court found in its  
3 prior order on Plaintiffs' Motions for Summary Judgment, there was a valid contract between  
4 Sotelo, on behalf of Sotelo Air, and Local 525. Immediately upon signing the Service Agreement  
5 on May 9, 2008, Sotelo incurred an obligation to remit contributions to Plaintiffs. He breached this  
6 obligation by failing to make contributions from May 9, 2008 to April 9, 2013. The failure to make  
7 contributions establishes statutory damages under ERISA.

8 The Court does not find that Sotelo terminated his obligations under the Service Agreement  
9 prior to April 9, 2013, when Local 525 received a termination letter written and signed by Sotelo.  
10 Therefore, as a matter of law, Sotelo and business entity Defendants are liable for damages from  
11 the period of May 9, 2008 to April 9, 2013. The Court discusses the damages calculation below.

### 12 **C. Breach of Fiduciary Duty under ERISA**

13 Under ERISA, a person is considered a fiduciary of an employee benefit plan if "(i) he  
14 exercises any discretionary authority or discretionary control respecting management of such plan  
15 or exercises any authority or control respecting management or disposition of its assets, (ii) he  
16 renders investment advice for a fee or other compensation, direct or indirect, with respect to any  
17 moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he  
18 has any discretionary authority or discretionary responsibility in the administration of such plan."  
19 29 U.S.C. § 1002(21). A fiduciary of an ERISA plan is authorized to bring a civil action to obtain  
20 equitable relief to redress violations of the Act or "to enforce any provisions of [the subchapter] or  
21 the terms of the plan." 29 U.S.C. § 1132(a)(3). A trust fund fiduciary may recover statutory  
22 damages under section 1132(g)(2) of ERISA. Idaho Plumbers & Pipefitters Health & Welfare  
23 Fund v. United Mech. Contractors, Inc., 875 F.2d 212, 215 (9th Cir. 1989).

24 As the Court found in its prior order, Sotelo cannot be considered a fiduciary because he  
25 lacked control or management over the administration of fund assets. Further, an employer's  
26 unpaid contributions are not plan assets. Bos v. Bd of Trs., 795 F.3d 1006, 1011 (9th Cir. 2015)  
27 (citation omitted). Thus, Sotelo's liability for unpaid contributions does not establish a breach of  
28 fiduciary duty.

1                   **D. Damages**

2           The Court finds that Sotelo is liable for unpaid contributions to Plaintiffs from May 9,  
3 2008, to April 9, 2013.

4                   **i. Amounts Due to Trust Funds**

5           The amount of unpaid contributions due to the Trust Funds is \$95,013.77. Pursuant to the  
6 Trust Funds' Collection Policy, "interest on the unpaid contributions shall be computed at fourteen  
7 percent (14%) per annum, simple interest, from the Due Date to the date of payment in full."  
8 Fourteen percent of the total unremitted contributions is \$13,301.93. Interest is calculated annually  
9 from April 2013, when the payments became due. Based on these terms, the interest due to date is  
10 \$69,835.13.<sup>1</sup> The amount of interest will continue to accrue until the amount due is paid in full.

11           Pursuant to the Trust Funds' Collection Policy, liquidated damages "are equal to the higher  
12 of \$20, twenty percent (20%) of the amount of unpaid contributions, or the interest due at the trust  
13 rate." Liquidated damages therefore also continue to accrue as interest accrues. As both \$20 and  
14 20% of the amount of unpaid contributions are less than the amount of interest accrued at the trust  
15 rate of 14%, the Court will award an amount of liquidated damages equal to the amount of accrued  
16 interest. The amount of liquidated damages due is \$69,835.13. Liquidated damages will also  
17 continue to accrue until the amount due is paid in full.

18           At the time the audit report was issued, the audit fees were \$11,875.96. An additional  
19 \$3,000 of audit fees were incurred between the time of the report and the date of trial. Therefore,  
20 the total amount of audit fees due to the Trust Funds is \$14,875.96.

21                   **ii. Amounts due to National Funds**

22           The total amount of contributions due to the National Funds is \$11,308.93. \$10,583.55 is  
23 due to the National Pension Fund, and \$725.38 is due to the International Training Fund. Pursuant  
24 to the National Pension Fund Delinquency Procedures, the National Pension Fund shall seek 12%  
25 interest on the amount due from the date of delinquency to the date of payment. Twelve percent of  
26 the unremitted contributions to the National Pension fund is \$1270.03. Interest is calculated

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27  
28           <sup>1</sup> The Court multiplies the annual amount of interest due, \$13,301.93, by 5.25 to arrive at  
this figure. April 2013 to the present day is roughly 5.25 years.



1 annually from April 2013, when the payments became due. Based on these terms, the interest due  
2 to the National Pension Fund to date is \$6,667.66.<sup>2</sup> The amount of interest will continue to accrue  
3 until the amount due is paid in full. Pursuant to the International Training Fund Trust Agreement,  
4 the International Training Fund also imposes an annual interest rate of 12%. The annual interest  
5 owed is \$87.04. The interest owed to the International Training Fund to date is \$456.96.<sup>3</sup>

6 Pursuant to the National Pension Fund Delinquency Procedures, liquidated damages of  
7 10% of the amount due are assessed against the delinquent employer if payment is not received by  
8 the due date. Based on these terms, the amount of liquidated damages due to the National Pension  
9 Fund is \$1,058.35. Pursuant to the International Training Fund Trust Agreement, liquidated  
10 damages are calculated for each monthly report or payment due in the amount of 20% of the  
11 amount due. Based on these terms, the amount of liquidated damages due to the International  
12 Training Fund is \$145.08. Liquidated damages do not accrue, pursuant to trust documents for both  
13 funds.

14 At the time the audit report was issued, the audit fees were \$1,174.55. An additional \$3,000  
15 of audit fees were incurred between the time of the report and the date of trial. Therefore, the total  
16 audit fees due to the National Funds collectively is \$4,174.55.

## 17 18 **VI. JUDGMENT**

### 19 **A. Delinquent Contributions**

20 The Court finds in favor of the Plaintiffs. The Court will award to the Trust Funds:  
21 \$95,013.77 in unpaid contributions, \$69,835.13 in accrued interest to date, \$69,835.13 in  
22 liquidated damages to date, and \$14,875.96 in audit fees.

23 The Court will award to the National Funds: \$10,583.55 in unpaid contributions to the  
24 National Pension Fund and \$725.38 to the International Training Fund, \$6667.66 in accrued  
25 interest to the National Pension Fund and \$456.96 in accrued interest to the International Training

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26  
27 <sup>2</sup> The Court multiplies the annual amount of interest due, \$1270.03, by 5.25 to arrive at this  
figure. As above, April 2013 to the present day is roughly 5.25 years.

28 <sup>3</sup> The Court multiplies the annual amount of interest due, \$87.04, by 5.25 to arrive at this  
figure.

1 Fund, \$1,058.35 in liquidated damages to the National Pension Fund and \$145.08 in liquidated  
2 damages to the International Training Fund, and \$4174.55 in audit fees to the National Funds  
3 collectively.

4 **B. Breach of Fiduciary Duty**

5 The Court finds in favor of Defendants and awards no damages.

6 **C. Attorneys' Fees and Costs**

7 The Court awards attorneys' fees and costs to the Trust Funds and to the National Funds.  
8 The Plaintiffs shall submit a proposed order with underlying documentation as to fees and costs  
9 within 30 days of this order.

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11 The Clerk of Court shall enter judgment accordingly and close this case.

12  
13 **IT IS SO ORDERED.**

14  
15 DATED this 3rd day of July, 2018.

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**RICHARD F. BOULWARE, II**  
**UNITED STATES DISTRICT JUDGE**